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In the Supreme Court of the United States

OCTOBER TERM, 1970

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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Respondent's brief in opposition contends that the question presented is not important because the kind of Commission action held reviewable by the court of appeals occurs only a few times each year. The argument erroneously assumes (1) that the decision of the court of appeals sanctions judicial review only of Commission rulings relating to stockholder proposals, and only rulings by the agency itself rather than by its staff, and (2) that at most one or two appellate proceedings could arise each year in the narrow category of cases to which respondent believes the decision below applies.

1. The Commission employs the same informal procedures and provides the same informal advice in re-

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viewing all proxy matters as it does in reviewing stockholder proposals. The requirement in all instances is merely one of filing; the procedures governing such filings are no more formal for stockholder proposals than for other proxy materials. See 17 C.F.R. 202.3(a).[1] Disputes between stockholders and the company before the Commission occur not only with respect to stockholder proposals but also with respect to other proxy matters, such as contests for corporate control, conflicts involving mergers, etc. The rationale of the court of appeals' decision is equally applicable to Commission proxy rulings on all of these subjects, and it suggests that any person—company as well as stockholder—who is dissatisfied with a Commission ruling may directly challenge it in the court of appeals.

Moreover, the court's rationale suggests that direct appellate review also would be available where the Commission merely declined to review its staff's decision rather than, as in the present case, declined to

[1] There is no basis for respondent's statement (Br. 4) that the "SEC has established what it itself describes as 'formal' and mandatory procedures which are specifically designed to deal with the rare situation in which a corporate management flatly refuses to accept a shareholder proposal for inclusion in its proxy materials." Subparagraph (d) of Rule 14a–8 does not "require that the parties' position papers be filed," as the respondent asserts (Br. 5). There is no reference to "parties" or to "position papers" in the rule; when a shareholder, such as the respondent, writes to the Commission concerning a proposal, it is on a purely voluntary basis. Since there are no formal administrative proceedings in proxy matters, there is no basis for respondent's suggestion (Br. 5) that management has the "burden of proof" in a proxy proceeding before the Commission.

overrule it. The Commission is responsible for the administration of its proxy rules; whatever authority its staff has in this area necessarily exists because the agency has delegated it to the staff; and the considerations that led the court of appeals to conclude that the Commission's determination to "raise no objection" if the company followed the staff's advice constituted reviewable agency action would seem to call for the same conclusion where the Commission declined to review the staff's determination.

2. Starting with the fact that only 137 companies received proxy proposals from their shareholders in fiscal year 1969, respondent states that there was an actual deadlock between the company and its shareholders in less than ten instances; and it concludes that since only those cases in which the Commission acted on the matter would be reviewable, the decision below will give rise to no more than one or two appellate proceedings each year. Since the rationale of the decision below is equally applicable to all actions by either the Commission or its staff relating to proxy matters, and not just to Commission actions relating to stockholder proposals, the proper starting point is not the 137 companies that received proxy proposals from their shareholders in 1969 (which is the basis upon which respondent rests its argument) but the more than 5,300 proxy filings made annually with the Commission. Although not all of the latter will give rise to a dispute between the company and the Commission that is likely to lead to litigation, the number of potential serious disputes within the latter category is far greater than respondent suggests.

Even on respondent's own terms, however, its figures are erroneous. While only 137 companies received shareholder proxy proposals in 1969, the number of proposals submitted to those companies was significantly greater: 221 were submitted, and the companies omitted 48 of them.[2] Since each proposal had to be considered separately, the actual number of shareholder-company disputes in that year was 48 rather than 19. Furthermore, in the light of present social and political currents, the number of proposals that will be submitted in future years is likely to increase, not to decrease, and an increasing number of them are likely to involve deadlocks between the company and a shareholder.

As pointed out in the petition (p. 17), and as respondent recognizes (Br. 14, n. 15), the court of appeals cannot grant the only effective relief in such a case, namely, an injunction; the district court alone can do that.[3] A decision which poses the real likelihood of substantial appellate litigation, which will have an unsettling effect on hitherto settled administrative procedures, and which realistically is unlikely to accomplish the basic aim of the proxy rules of best aiding corporate democracy, warrants review by this Court.

* * * * *

On January 26, 1971, Dow wrote respondent that it was considering including respondent's proposal in

[2] Securities and Exchange Commission, Thirty-fifth Annual Report 47 (1969).

[3] As pointed out in the petition, the Committee has a fully adequate remedy; it can sue the company in the district court to enjoin alleged violations of the proxy rules.

the company's proxy materials for the 1971 annual meeting. A copy of that letter is attached. Dow stated that it was still of the view that it properly could omit the proposal, and that its decision to consider including it was made "as a matter of policy and without prejudice to our right at any time to claim that your proposal * * * is one which may be properly omitted."

The fact that Dow may distribute the proposal in connection with its 1971 annual meeting—or, indeed, the fact that it actually does so—does not render this case moot. *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 43; *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632–633. *Walling* is directly in point. In holding that a case involving the legality, under the Fair Labor Standards Act, of so-called "split-day contracts" was not rendered moot by the company's abandonment of the contracts during the litigation, the Court stated (p. 43): "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. * * * Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." The same reasoning applies to the dispute between respondent and Dow over whether the latter is required to distribute to its shareholders the Committee's proposal. Dow continues to insist that it is not required to distribute the proposal, and even if it does so this year and the proposal is defeated, Dow may reject it in future years.

Although Dow's recent action does not render the case moot,[4] it does further underline the inappropriateness of permitting direct court of appeals review of Commission proxy actions. For even if, under the remand directed by the court of appeals, the Commission were now to conclude that Dow is required to include the Committee's proposal, this would be a wholly advisory opinion that would not bind Dow. The only way Dow could be compelled to include the Committee's proposal is pursuant to an order entered by the district court in an action brought either by the Commission or by the Committee. The court of appeals' decision merely adds an unnecessary layer of appellate review that cannot definitively decide the controversy.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel.

FEBRUARY 1971.

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[4] If the Court nevertheless should conclude that the case is moot, the proper disposition would be to grant the petition, vacate the judgment of the court of appeals and remand the case to that court with directions to dismiss the petition for review as moot. *Sears, Roebuck & Co.* v. *Carpet Layers*, 397 U.S. 655.

APPENDIX

THE DOW CHEMICAL COMPANY,
Midland, Michigan, January 26, 1971.

DR. ELI C. MESSINGER,
Chairman, Medical Committee for Human Rights
410 South Eighth Street
Philadelphia, Pa. 19147

DEAR DR. MESSINGER: We are in receipt of your letter of January 16 submitting a proposal on the subject of production of napalm by The Dow Chemical Company for presentation at our Annual Meeting of Stockholders to be held May 4, 1971.

For reasons stated in previous opinions of counsel, with which you were furnished prior to our 1969 and 1970 Annual Meetings, it is our opinion that your proposal may properly be omitted from the proxy materials in connection with our forthcoming Annual Meeting. We have determined, however, as a matter of policy and without prejudice to our right at any time to claim that your proposal or any similar proposal previously submitted by you is one which may be properly omitted, to consider including your proposal in the proxy materials in connection with such Annual Meeting. If the decision is to include your proposal the management will, however, recommend voting against it. Before we can make a final determination, however, we must see your statement not exceeding one hundred words in support of your pro-

posal, which should be submitted to us as promptly as possible.

Sincerely yours,

W. A. GROENING, Jr.,
General Counsel.

cc: 66 W. 87 Street
N.Y., N.Y. 10024
Herbert H. Dow

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